Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1099

LORENZA SHORT,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
The Decision Below Is In Direct Conflict With The Decisions Of This Court Excluding Incriminating Evidence Of Extrajudicial Statements Of A Co-Defendant Who Is Not Subject To Cross-Examination And Who Could Have Been Made Available As A Witness	7
Harmless Error Exception Inapplicable	8
Co-Conspirator Exception Inapplicable	10
CONCLUSION	12
Appendix	1a

INDEX OF AUTHORITIES

Cases:	*Page*
Brookhart v. Janis, 384 U.S. 1 (1966)	7
Bruton v. U.S., 391 U.S. 123 (1968)	6,7
Chapman v. California, 386 U.S. 18 (1967)	2,7,8,9
Douglas v. Alabama, 380 U.S. 415 (1965)	7
Dutton v. Evans, 400 U.S. 74 (1970)	10,11
Fahy v. Connecticut, 375 U.S. 84 (1963)	8,9,12
Harrington v. California, 395 U.S. 250 (1969)	8
Hawkins v. U.S., 358 U.S. 574 (1958)	4
Ivey v. U.S., 344 F.2d 770 (CA5 1965)	4
Peek v. U.S., 321 F.2d 934 (CA9 1963)	4
Roberts v. Russell, 392 U.S. 293 (1968)	7
Stewart v. Cowen, 528 F.2d 79 (CA6 1976)	11
U.S. v. Kelly, 526 F.2d 615 (CA8 1975) cert. den. 96 S.Ct. 1471	11
U.S. v. Snow, 521 F.2d 730 (CA9 1975) cert. den. 423 U.S. 1090	11
U.S. v. Yates, 524 F.2d 1282 (CA D.C. 1975)	11
Constitution:	
U.S. Const. Am. 6	2,3
Statutes:	
18 U.S.C. §6001-6003	6,11
26 U.S.C. §7201	3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Lorenza Short, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 13, 1976, and the Order of said Court denying the petition for rehearing, entered January 10, 1977.

OPINION BELOW

The following unpublished orders are appended for the convenience of the Court:

a. The Order of the Sixth Circuit Court of Appeals, affirming the judgment of the District Court, December 13, 1976.

b. The Order of the Sixth Circuit Court of Appeals denying the defendant-appellant's petition for rehearing, January 10, 1977.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit affirming the judgment of conviction was entered on December 13, 1976. Appellant-Petitioner's timely filed petition for rehearing was denied on January 10, 1977. This petition for certiorari is filed within 30 days of that date. Petitioner's Motion for Stay of the Mandate for a period of 30 days was granted by the Court of Appeals for the Sixth Circuit on January 19, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

By affirming a conviction based upon admission of incriminating extrajudicial statements of petitioner's spouse, where he was denied both confrontation of the available declarant and a requested cautionary instruction, did the Court of Appeals for the Sixth Circuit erroneously refuse to apply the Sixth Amendment to the United States Constitution and the standards of *Chapman v. California,* 386 U.S. 18 (1967) that the Court must find the prosecution has met the burden of showing such constitutional error to have been harmless beyond a reasonable doubt before the conviction may be allowed to stand?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

Amendments, Article VI–In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

(Appendix refers to the Appendix filed in the Circuit Court of Appeals for the Sixth Circuit).

Petitioner, Lorenza Short, was convicted of four counts of income tax evasion under 26 U.S.C. §7201 for calendar years 1967-1970.

It was the defense contention that Short had no knowledge of the contents of the returns, was unaware that they were substantially deficient, and had not committed the affirmative attempt charged of doing and causing to be done the preparation, signing and mailing of the returns, knowing them to be false. He erroneously assumed his wife was adequately and properly taking care of them.

During the prosecution case Mrs. Marie Evans, the return preparer, testified that she prepared returns from information supplied by Mrs. Short. All her dealings were with Mrs. Short and none with Petitioner. The subject returns showed income from a restaurant, apartments, rentals, a motel and "net gambling

income". The income from all but the gambling was determined by Mrs. Evans through records obtained from Mrs. Short. Over defense objection, Evans was permitted to testify to the statements of Mrs. Short made while the gambling information was furnished by her.[1] It was clear that the return deficiencies stemmed from an understatement of the gambling income.

The government's case consisted solely of circumstantial evidence and the spouse's extrajudicial utterance[2] created the only link between petitioner and knowledge of the contents of any of the four returns in question.

The import of this testimony was that petitioner had conveyed a false figure to his wife for inclusion in the

[1] Q. "How did you determine gambling income?"
A. "This figure was given to me by Mr. and Mrs. Short."
Q. "Can you explain that to us; how this figure came from Mr. and Mrs. Short?"
A. "Well, I would call Mrs. Short about the gambling figure that she was going to use for the current year and she would say, 'I am going to check with Mr. Short'. So, then she would call me back and give me the figure."
Q. "Did you ever get a figure in some other way for gambling?"
A. "She would ask 'What did we do last year?'—I never got any figure from any other way, no."
Q. "But sometimes you just testified that she would say to you, 'What did we report last year'?"
A. "Right."
Q. "And what did she say then, if anything?"
A. "She would say 'Let's use the same thing', or it might be that she would lower it some, but she—they would give me the figure."

(Appendix pgs. 128-129)

[2] In the lower court this testimony was also objected to as a violation of petitioner's marital privilege. *Hawkins v. U.S.* 358 U.S. 574 (1958); *Ivey v. U.S.* 344 F.2d 770 (CA5 1965); *Peek v. U.S.* 321 F.2d 934 (CA9 1963).

tax returns as net gambling income. It created an unfair and overwhelming burden and one which the petitioner should not have been required to overcome. Despite his uncontested testimony in denial, the jury found he had the requisite guilty knowledge.

The Assistant U.S. Attorney, in his closing argument, pressed this very point.[3]

This was the sole evidence from which it could be inferred that Short had provided information or had any actual knowledge of the contents of the returns, much less that such contents were fraudulent.

Other testimony established without contradiction that Short did not sign any of the four allegedly fraudulent returns. A government expert testified that Mrs. Short had signed both names on each return. Short

[3] "Then, we get to the next element and this requires a certain amount of consideration, a great deal of consideration. The Government has to prove that he knew this money wasn't being reported. Here, I submit the evidence is only subject to one interpretation and that is that the Defendant thought that he could beat the State of Michigan and the Federal Government out of his true and accurate tax liability.

We know of one, of two events which took place, one you will recall a Mrs. Marie Evans testifying she prepared these returns. She would have it pretty much prepared and when she got to the part of the gambling she wouldn't know what to put down. She had occasion to call Mr. Short and Mrs. Short would say, "I will have to check with Lorenzo" and at some later time Mrs. Evans would get a figure to put down.

Now, we don't really know what went on here. Did Lorenzo give a figure that was as small as could be? Did he give her the actual figure around $10,000.00 for each year except one year when it was $16,000.00? We don't know. He could have given that small figure that was actually one. Why would Mrs. Evans come here and lie to you? I don't think she did. Why would Mamie Short tell Marie Evans, the return preparer a story? There was no criminal investigation going on and that seemed to be pretty credible the way Marie Evans explained it."

(Appendix pg. 158-159.)

was outside of the State of Michigan when the returns were prepared and signed and, therefore, did not examine them.

Short denied he ever furnished the gambling income figure to Mrs. Short. He assumed she was properly taking care of the return obligations and that she had adequate information from her awareness of his activities. He had no knowledge of any contents.

Short's reading and mathematical abilities were professionally tested and found to be at the lowest elementary school level.

Despite a timely objection to the Evans testimony, and a subsequent motion for a mistrial, both based upon, and with reference to, the decision in *Bruton v. U.S.*, 391 U.S. 123 (1968), the Evans testimony was admitted and allowed to remain before the jury without any cautionary instruction as to its use.

Petitioner, Short, sought to call his spouse for examination. Such examination was denied when she claimed her constitutional right against self-incrimination. Neither the Court nor the government offered her use immunity (18 U.S.C. §6001-6003) so that the firsthand testimony would be available to the petitioner in his defense.

A written defense request[4] that the jury be instructed to disregard the testimony was refused. This request was renewed in open court and denied by the judge.

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[4]C. (The Court has heretofore over-ruled Defendant's motion for a mistrial on the grounds that the statement of Mrs. Marie Evans to the effect that Mamie Short told her that she would get the figure for net gambling income from the Defendant, Lorenza Short, is inadmissible heresay (sic) and said Defendant was denied the constitutional right of confrontation of the Co-Defendant, maker of this extra judicial statement. *Bruton v. U.S.* 391 U.S. 123, 30 L.Ed.2d 476, 88 S.Ct. 1620. The following request for instruction *is not* a Waiver of Defendant's claim for

(continued)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT EXCLUDING INCRIMINATING EVIDENCE OF EXTRAJUDICIAL STATEMENTS OF A CO-DEFENDANT WHO IS NOT SUBJECT TO CROSS-EXAMINATION AND WHO COULD HAVE BEEN MADE AVAILABLE AS A WITNESS.

Bruton v. U.S., supra, *Douglas v. Alabama*, 380 U.S. 415 (1965), *Brookhart v. Janis*, 384 U.S. 1 (1966), *Chapman v. California*, supra, *Roberts v. Russell*, 392 U.S. 293 (1968).

The declarant spouse's own explanation of the truth and meaning of the statement was unavailable to the defendant even though he expressly called her as a witness. He was further denied the opportunity to directly test her statement's credibility under oath and in the presence of the jury.

(footnote continued from preceding page)

mistrial since Defendant believes that the jury is unable to ignore such testimony even with an instruction.)

> At an earlier stage in the proceedings, Mrs. Marie Evans testified that the Defendant, Mamie Short, told her that she, Mamie Short, would have to get a figure as to gambling income from the Defendant, Lorenza Short, and that later, Mrs. Short did transmit such figure. This testimony is not admissible against the Defendant, Lorenza Short, and may not be considered by you in the case against him. You must treat such testimony as if it did not exist since the Defendant has not had the opportunity in this trial to cross-examine the declarant, Mrs. Short, to determine from her testimony if in fact she claims to have received said information from the Defendant, Lorenza Short.

(Appendix pgs. 55-56)

Admission of such evidence is plain and fundamental error requiring the conviction to be set aside unless the case falls within a specific exception. No such exception was found by the Court below nor did it declare the objectionable statement to be admissible.

HARMLESS ERROR EXCEPTION INAPPLICABLE

One such exception suggested by the government, but not adopted by the Court of Appeals for the Sixth Circuit was that the effect of the improper evidence was merely cumulative. To the contrary, in this case, built upon circumstantial evidence, this evidence was crucial and furnished, by inference, the sole direct link between Short and the preparation of the returns and/or knowledge of their contents.

Before an error such as this may be classified as "harmless" and merely "cumulative" there must be a cautionary instruction. *Harrington v. California*, 395 U.S. 250 (1969). In the present case both written and verbal defense requests for such an instruction were denied and the jury was improperly allowed to consider the spouse's extrajudicial statements as if they were evidence of defendant's guilt.

Further, the government has a substantial burden to bear before the defendant's conviction may be allowed to stand. *Chapman v. California*, supra, *Fahy v. Connecticut*, 375 U.S. 84 (1963).[5] It is the burden of

[5] "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut*, 375 U.S. 84, 11 L.Ed.2d 171, 84 S.Ct. 229. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman v. California*, supra, pg. 23.

the government to establish beyond a reasonable doubt that the error was harmless and that there was no reasonable possibility that the evidence complained of might have contributed to the conviction.

Despite the written motion for new trial citing this issue, submitted to the District Court after the jury verdict, and the appeal to the Sixth Circuit Court of Appeals, neither Court has ever suggested that this standard could possibly be met under the facts of this case. *Chapman v. California*, supra, mandates an affirmative finding of the Court that the burden has been met.[6] At no time has the Respondent ever specifically detailed "overwhelming" evidence which could meet the standard of *Chapman* and *Fahy*, supra,[7] nor has the court below ever declared a belief that the

[6] "We, therefore, do no more than adhere to the meaning of our Fahy Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, supra, pg. 24.

[7] The Respondent's primary evidence on the subject of Short's imputed knowledge and intent was to be inferred from testimony pertaining to two other audits of the defendant, each unrelated in time and one also unrelated in nature. Ralph F. Childs, IRS Tax Accountant, testified that a monetary entry in documentary exhibits (9J, 9K and 9L) showed the Shorts had been the subject of fifty-percent penalties for "fraud" on their 1950, 1951 and 1952 U.S. Income Tax Returns. A defense objection (Appendix pgs. 76-77) was overruled. The penalties were an uncontested administrative assessment of civil liability for periods 15-17 years prior to those years under indictment.

Joseph C. Walsh, an employee of the Michigan Department of Treasury was permitted, over defense objection to relevance and its inflammatory nature, to testify to an audit of the Shorts for Michigan Business Activities taxes and Sales taxes for 1958-1961. The audit was for periods 6-9 years earlier than those in the earliest indictment year. The State of Michigan did not have a State income tax until 1967.

Admission of the above evidence was raised as an issue in the Court below but received no comment.

extrajudicial statements of petitioner's spouse were harmless beyond a reasonable doubt and could not reasonably have contributed to the conviction.

Because the respondent's burden has not been met, the conviction should be overturned.

CO-CONSPIRATOR EXCEPTION INAPPLICABLE

In its brief to the Court of Appeals for the Sixth Circuit, Respondent suggested, for the first time, that the Evans' testimony qualified as an exception to the constitutional right of confrontation as an extrajudicial statement of a co-conspirator in accordance with this Court's opinion in *Dutton v. Evans*, 400 U.S. 74 (1970). In *Dutton*, a 5-4 decision, a plurality of four justices announced a standard within which the extrajudicial statement of a co-conspirator would be admissible despite the lack of confrontation. Neither Court below made any determination or suggestion that this exception was pertinent or material to this case. No conspiracy was alleged in the indictment and there was no evidence aliunde from which a conspiracy to commit an unlawful act could be implied since there was no evidence to show Short knew the information furnished by his spouse was fraudulent (if in fact it was since she never testified whether or not she knew the returns were false when she filed them).

Even if the necessary evidence aliunde of the conspiracy were found to exist, despite the lower court's failure to so find, the three mandatory standards set by this Court in *Dutton v. Evans*, supra have not been met.

(1) There must be an indicia of reliability surrounding the extrajudicial statement;

(2) The extrajudicial statement must be peripheral rather than crucial or devastating;

(3) The witness must be equally available to the prosecution and the defense; *Dutton v. Evans*, supra, *U.S. v. Snow*, 521 F.2d 730 (CA9 1975), cert. den. 423 U.S. 1090; *U.S. v. Kelley*, 526 F.2d 615 (CA8 1975) cert. den. 96 S.Ct. 1471; *U.S. v. Yates*, 524 F.2d 1282 (CA D.C. 1975).

Clearly the third requirement of *Dutton v. Evans*, supra, that the witness be equally available to the prosecution and the defense is lacking. The Respondent could have granted the witness "use immunity" under 18 U.S.C. §6001-6003 at little cost to itself but failed to do so, thus denying Short this important defense testimony. This alone is sufficient for reversal *U.S. v. Yates*, supra. The Constitution imposes upon the prosecution the unavailability of a witness before it may introduce less reliable accounts of his statement in a criminal trial. *Stewart v. Cowen*, 528 F.2d 79 (CA6 1976).

The indicia of reliability is missing in that the offending testimony tends to exculpate the declarant spouse in some respects at the expense of inculpating the petitioner, Short.

Further, on the facts of this case, the testimony is crucial and not merely peripheral where it provides the sole link between Short and the actual furnishing of false information for use in the return. The lower court was itself concerned with sufficiency of the evidence as expressed in the general language of its opinion attached hereto. In this case, constructed entirely or circumstantial evidence, the spouse's statement showing participation of the defendant in the preparation of the returns was severely and prejudicially damaging.

Finally, it should be pointed out that the co-conspirator exception to the general rule of confrontation

rights is not yet firmly entrenched in our law. Speaking for the minority in dissent, Mr. Justice Marshall stated, *Dutton v. Evans*, supra, Pg. 111:

> "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant whether or not his statement falls within a genuine exception to the hearsay rule."

In general the use of such statements is viewed with grave suspicion and caution even by those who would admit them in limited circumstances. A conviction should not be allowed, as in this case, to substantially rest on the use of such evidence.

CONCLUSION

For these reasons a writ of certiorari should issue to review the Orders of the Court of Appeals for the Sixth Circuit affirming petitioner's conviction and denying his petition for rehearing.

Respectfully submitted,

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NO. 76-1614
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee	:	FILED DEC 13 1976 JOHN P. HEHMAN, CLERK
v.	:	
LORENZA SHORT Defendant-Appellant	:	**ORDER**
and	:	
MAMIE O. SHORT Defendant	:	

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

This appeal, perfected from a judgment of conviction entered on jury verdict finding defendant-appellant guilty of four counts of attempted income tax evasion in violation of Section 7201 of the Internal Revenue Code, has been submitted on the record on appeal and on the briefs and oral arguments of counsel.

It is apparent from the record that counsel for the Internal Revenue Service have in what appears to be their routine customary operation abused the subpoena process in a procedure which requires members of the public to absent themselves from their places of employment to appear for interrogation for investigative rather than testimonial purposes at such times as may suit counsel's convenience without regard to their own. While this abuse introduces an element of unfairness since no corresponding privilege is enjoyed by defense counsel who also lack the extensive investigative resources available to government agencies, *United States v. Keen*, 509 F.2d 1273, 1274-5 (6th Cir. 1975), Rule 17 Federal Rules of Criminal Procedure, no

prejudice as a result of such abuse has been shown in the present case.

It is further concluded that whatever deficiences may have existed in the appellee's case in chief in connection with its attempt to prove that in doing certain acts appellant's wife acted as his agent were supplied by the subsequent testimony of the appellant, and it is noted that no motion for a judgment of acquittal was made at the conclusion of the appellee's case. It having been determined that the other contentions offered by the appellant are without merit,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk of Court

NO. 76-1614
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee	:	FILED JAN 10 1977 JOHN P. HEHMAN, Clerk
v.	:	
LORENZA SHORT Defendant-Appellant	:	**ORDER**
and	:	
MAMIE O. SHORT Defendant	:	

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

Defendant-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk of Court